Supreme Court, U.S.
FILED
JUL 12 1995
CLERK

(3)

No. 94-2041

In The

Supreme Court of the United States

October Term, 1995

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA,

Petitioner,

vs.

THE CITY OF OMAHA, NEBRASKA, a Municipal Corporation; MAYOR P.J. MORGAN, successor to MAYOR BERNIE SIMON; STEVE EXON; FRED CONLEY; JOSEPH FRIEND; STEVE TOMASEK; LEE TERRY; RICHARD TAKECHI; and SUBBY ANZALDO, all as Council Members of the City of Omaha,

Respondents.

Petition For Writ Of Certiorari To The Nebraska Court Of Appeals

REPLY BRIEF

H. DANIEL SMITH
Counsel of Record
JAMES D. SHERRETS
SHERRETS, SMITH AND GARDNER, P.C.
Attorneys for Petitioner
260 Regency Parkway
Omaha, NE 68114
(402) 390-0404

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

12 pp

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ARGUMENT IN REPLY TO RESPONDENT'S OPPOSITION TO GRANTING WRIT 2

A. Nebraska Revised Statute Section 31-765 Provides Continued Existence for SID 210 Until a Final Determination by the United States Supreme Court 3

B. A Corporation May Prosecute an Action for at Least Two Years after its Dissolution 4

C. The Petition to this Court was Properly Authorized and Timely Within the Rules of the United States Supreme Court 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Christens v. Boss, 179 Neb. 429, 138 N.W.2d 716 (1965) 6

City of Millard v. City of Omaha, 185 Neb. 617, 177 N.W.2d 576 (1970); *cert denied*, 401 U.S. 951, 28 L.Ed.2d 234, 91 S.Ct. 975 (1971) 4

Farmers Union Co-op Ass'n v. MidStates Const. Co., 212 Neb. 147, 322 N.W.2d 373 (1982) 6

Licht v. Association Services, Inc., 236 Neb. 616, 463 N.W.2d 566 (1990) 6

Lincoln Butter Co. v. Edwards-Bradford Lumber Co., 76 Neb. 477, 107 N.W. 797 (1906) 6

McCormack v. Citibank, N.A., 241 Neb. 436, 489 N.W.2d 293 (1992) 5

Ruplinger v. Ruplinger, 154 Neb. 394, 48 N.W.2d 73 (1951) 6

STATUTES

Neb. Rev. Stat. § 21-20,104 (Neb. Reissue 1991) 5

Neb. Rev. Stat. § 31-727 (Neb. Reissue 1991) 5

Neb. Rev. Stat. § 31-731 (Neb. Reissue 1991) 5

Neb. Rev. Stat. § 31-762 (Neb. Reissue 1991) 5

Neb. Rev. Stat. § 31-765 (Neb. Reissue 1991) 2, 3

STATEMENT OF THE CASE

Petitioner has previously set forth pertinent facts in its Petition for Writ of Certiorari. Respondent's Statement of the Facts contains at least one error. The Nebraska Supreme Court overruled Petitioner's Motion to Stay Mandate on April 14, 1995, not April 7, 1995. The Respondent also failed to note that Petitioner's Motion for Rehearing, filed March 24, 1995, and Motion to Recall Mandate filed March 27, 1995, were overruled by the Nebraska Supreme Court on April 3, 1995. The Respondent further failed to note that, following the decision of the Nebraska Supreme Court on April 14, 1995, Petitioner attempted to delay enforcement of the mandate pending appeal to this Court. On April 21, 1995, however, the Douglas County District Court, Judge Robert V. Burkhard presiding, denied Petitioner's Motion to Stay Execution and Enforcement of the Mandate.

It should also be noted that the duly elected Board of Trustees for Sanitary and Improvement District 210 of Douglas County, Nebraska (hereinafter "SID 210") authorized the filing of a Petition for Writ of Certiorari with this Court pending exhaustion of other appellate remedies. Said authorization occurred on March 24, 1995. This decision was ratified again at a meeting of the Board on April 21, 1995. Both of these actions took place before the purported dissolution date of April 24, 1995.

ARGUMENT IN REPLY TO RESPONDENT'S OPPOSITION TO GRANTING WRIT

The only argument which the Respondent has made to this Court in support of its opposition to granting a writ of certiorari is based on the alleged untimeliness of Petitioner's filing of a Petition for Writ of Certiorari. Respondent contends that by operation of law under Neb. Rev. Stat. § 31-765, SID 210 was dissolved on April 24, 1995, and thereby lacked corporate existence to make application to this Court.

Respondent's contention is misguided for a number of reasons. First, the plain language of the statute upon which the Respondent relies makes it clear that the SID does not go out of existence until a final determination by a court of competent jurisdiction has been made regarding the legitimacy of the attempted annexation. In the present case, there has been no such final determination. Moreover, under both common law and specific Nebraska statutory authority, a dissolved corporation has the right to prosecute an action in its name for at least two (2) years after such dissolution. Thus, even assuming arguendo that SID 210 was dissolved on April 24, 1995, it still possesses a right to prosecute an appeal to this Court. Finally, the Board of Trustees of SID 210 authorized a Petition for Writ of Certiorari to this Court prior to April 24, 1995. The applicable rules of this Court provide that Petitions for Writ of Certiorari must be filed within ninety days of an order denying discretionary review by the state court of last resort. In this case, the final order denying discretionary review by the state court of last resort was entered (at the earliest) on March 15, 1995. The Petition for Writ of Certiorari was filed with

this Court on April 26, 1995. To the extent that an appeal was properly authorized, and the Petition was timely filed under the rules of this Court, no objection should be entertained that the Petitioning party was incapable of pursuing such action.

A. Nebraska Revised Statute Section 31-765 Provides Continued Existence for SID 210 Until a Final Determination by the United States Supreme Court.

Nebraska law states that the effective date of any merger due to an annexation is not effective until thirty (30) days after the final determination by a court of competent jurisdiction. Nebraska Revised Statute § 31-765 provides, in relevant part:

> " . . . if the validity of the ordinance annexing the territory is challenged by a proceeding in a court of competent jurisdiction, the effective day of the merger shall be thirty days after the final determination of the validity of the ordinance."

The United States Supreme Court is a "court of competent jurisdiction" pursuant to Article III of the United States Constitution, 28, United States Code 1257(a), and Rule 12 of the Rules of the Supreme Court of the United States of America, and has the discretion to grant further review of this case in the course or reaching a final determination of the validity of the challenged ordinance.

The final determination of the validity of the ordinance will only have been reached when the time for filing a Petition for Writ of Certiorari has run, the Petition for Writ of Certiorari is denied by the Supreme Court, or

the decision of the Nebraska Court of Appeals is affirmed by the Supreme Court.

The Nebraska Legislature wrote and adopted a broad statute in Section 31-765. Apparently, the Nebraska Legislature took into account and understood the Constitution of the United States, including Article III, which allows the Supreme Court in its discretion to examine cases such as this one. Moreover, there have been previous appeals to the United States Supreme Court by annexed Nebraska subdivisions. *See, e.g., City of Millard v. City of Omaha*, 185 Neb. 617, 177 N.W.2d 576 (1970); *cert. denied*, 401 U.S. 951, 28 L.Ed.2d 234, 91 S.Ct. 975 (1971). If the Nebraska Legislature did not intend to include the Supreme Court within its realm of courts of competent jurisdiction, it has had more than ample time to so amend the statute. Since the Legislature has not expressly stated otherwise, and in light of the constitutional and federal laws governing the jurisdiction of this Court, the United States Supreme Court must be assumed to be a court of competent jurisdiction under Nebraska law. Accordingly, by operation of the very statute upon which the Respondent relies, SID 210 should be deemed to be in continued existence because this Court has not yet made a final determination of the validity of the annexation.

B. A Corporation May Prosecute an Action for at Least Two Years after its Dissolution.

The Respondent has not disputed the fact that SID 210 is a corporate body. The relevant Nebraska statutes also indicate that Sanitary and Improvement Districts are to be treated just like any other corporation. Nebraska

Revised Statute Section 31-731 indicates that SIDs are at least in some degree like corporations created under general Nebraska law with regard to required filings. Section 31-731 also expressly states that SIDs shall "have the power and authority to take and hold real and personal property necessary for its use, to make contracts, **to sue** and be sued, to have and use a corporate seal, **and to exercise any and all other powers, as a corporation**, necessary to carry out the purposes of sections 31-727 to 31-762." (emphasis added).

Implicit in the language of the foregoing sections, as well as the statutory framework creating Sanitary and Improvement Districts, in the directive that SIDs are to be treated just as any other corporation. They exercise necessary powers, including the capacity to sue, just as any other corporation would.

Nebraska Revised Statute Section 21-20,104 provides that the dissolution of a corporation by a decree of court "shall not take away or impair any remedy available to or against such corporation, its directors, officers or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name."

The Nebraska Supreme Court indicated in *McCormack v. Citibank, N.A.*, that Section 21-20,104 is a "survival statute", which gives the right to sue (or to be sued) to dissolved corporations for a period of up to two years following the dissolution. *McCormack v. Citibank, N.A.*,

241 Neb. 436, 489 N.W.2d 293, 296-7 (1992). In the present case, even assuming SID 210 was dissolved (or out of its corporate existence) on April 24, 1995, it still has the right to prosecute an appeal or to Petition this Court in its own name for a period of up to two years following its dissolution. Nebraska case law, apparently overruled or amended by 21-20,104, also previously held that a dissolved corporation could prosecute actions accruing in its favor during its existence. *See, e.g., Ruplinger v. Ruplinger*, 154 Neb. 394, 48 N.W.2d 73, 75 (1951); and *Lincoln Butter Co. v. Edwards-Bradford Lumber Co.*, 76 Neb. 477, 107 N.W. 797, 798 (1906); *but see, Licht v. Association Services, Inc.*, 236 Neb. 616, 463 N.W.2d 566, 571 (1990); *Farmers Union Co-op Ass'n v. MidStates Const. Co.*, 212 Neb. 147, 322 N.W.2d 373, 376 (1982); and *Christens v. Boss*, 179 Neb. 429, 138 N.W.2d 716, 720 (1965) (indicating corporations must rely on statute to prosecute actions after dissolution).

Since the present case arose during SID 210's corporate existence, even if it is dissolved, it has the authority to Petition this Court for a Writ of Certiorari. SID 210 has done this, and obviously within the two year limitation period. Accordingly, no objection should be made to the Petition on the basis that SID 210 lacks corporate existence. The Petitioner would also note that this determination, and the aforementioned supporting cases and statutes, should be contrasted with the Respondent's bald assertions to the contrary, unsupported by an authority whatsoever.

C. The Petition to this Court was Properly Authorized and Timely Within the Rules of the United States Supreme Court.

As stated above, the Board of Trustees for SID 210 authorized the filing of a Petition for Writ of Certiorari on March 24, 1995. As also can be determined from the above stated facts, the Petitioner exhausted every possible avenue for relief pending appeal to this Court.

It would be grossly unjust and inequitable to deny the Petition for Writ of Certiorari on the basis that it was not docketed while the SID remained in existence. At every possible step, Petitioner attempted to retain its existence for the very purpose of prosecuting an appeal to this Court. In each and every instance, the Respondent asserted that only this Court could act, and that the other courts were without jurisdiction. Respondent now comes to this Court and essentially argues that because the Petitioner did not gain a stay of the mandate from the lower courts, it cannot Petition this Court. At the very least, this argument is somewhat inconsistent, if not wholly specious.

This Court allows ninety (90) days to file a Petition for Writ of Certiorari after the entry of final judgment or the denial of review by the state court of last resort. The Petitioner has filed within this time, and the Respondent has not even attempted to argue otherwise. As a practical matter, the time necessary to properly research, write and print a Petition for Writ of Certiorari would foreclose an appeal within the corporate existence if Respondent's arguments were accepted. The Respondent should not be allowed to gain the benefit of the very hardship it caused

due to its resistances to the requests for stays in the lower courts. Accordingly, even if the Court were to determine that SID 210 no longer is in existence, and was thereby somehow technically precluded from prosecuting an appeal, Petitioner requests this Court to nevertheless consider its Petition on the grounds of equity and fairness and its constitutional right to due process of law.

CONCLUSION

The Respondent has utterly failed to make any proper objection to granting a Writ of Certiorari in the present case. The Respondent has not disputed any statements of fact or law set forth in the Petition for Writ of Certiorari. Such failure should be deemed an admission that said statements are correct, thus, indicating that there has been absolutely no compliance with federal law regarding the attempted annexation in this case.

The Respondent's only contention in opposition to granting a writ is neither supported in fact nor by the law. Contrary to Respondent's assertions, SID 210 continues to exist because a final decision has not been handed down by a court of competent jurisdiction (i.e. the United States Supreme Court). Even were this Court to assume that SID 210 no longer exists, the law clearly provides that it may still maintain an appeal or Petition for Writ of Certiorari to this Court. The Respondent has failed to produce any law whatsoever indicating anything to the contrary. Finally, equity would require entertaining the present Petition because it was authorized by the SID prior to its purported dissolution date and filed well

within the time limits established by the Court. To accept Respondent's contentions would effectively mean that no similarly situated entity could prosecute an appeal to this Court, because the time required to research, write, and print material necessary for such action would for all practical purposes make timely action impossible.

Respectfully submitted,

H. DANIEL SMITH
Counsel of Record
JAMES D. SHERRETS
260 Regency Parkway
Omaha NE 68114
(402) 390-0404